

NTSB Order No. EA-4417

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of January, 1996

Respondent .

Docket SE-14281

Respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on December 8, 1995, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed an emergency order of the Administrator revoking respondent's

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airline transport pilot (ATP) certificate for acting in the capacity of a required pilot flight crewmember without a current pilot certificate, in violation of section 61.3(a) of the Federal Aviation Regulations ("FAR," 14 CFR Part 61).² The emergency revocation resulted from respondent's alleged act of disregarding the Administrator's attempts, over the course of about a year and a half, to effectuate the suspension of his ATP certificate for an alleged regulatory violation. A Notice of Proposed Certificate Action (NOPCA) was sent to respondent's address of record, and later to the home of his mother. It was then followed by two suspension orders. Respondent asserts that he received neither the notices nor the suspension orders and, therefore, was unaware that he had been operating an aircraft without a valid pilot certificate. For the reasons discussed below, the appeal will be denied.³

The pertinent chronology is as follows: On June 20, 1994, the Administrator sent a NOPCA, via certified mail, return receipt requested, to respondent at his Monroe, New York address

²The emergency order (complaint) alleged a violation of FAR section 61.3(a) which provides, in pertinent part, as follows:

§61.3 **Requirement for certificates, rating, and authorizations.**

(a) Pilot certificate. No person may act as pilot-in-command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part....

³The respondent has filed a brief on appeal and the Administrator has filed a reply brief opposing the appeal.

(his address on record with the FAA), notifying him that an investigation was being conducted into his alleged February 24, 1994 violation of an air traffic control clearance and proposing a 90-day suspension of his ATP certificate. (Exhibit (Ex.) A-1.)

The notice was returned marked "moved, left no address," and stamped June 23, 1994. (Ex. A-2.) The same notice was then sent by regular mail on June 30, 1994 and, again, was returned by the post office marked "moved left no address," and stamped July 14, 1994. (Ex. A-3.) Respondent testified that he had not collected his mail at the New York address for some time because he had been living temporarily in Hawthorne, New Jersey, caring for his seriously ill mother.⁴

The Administrator, after locating another address for respondent, sent the NOPCA on October 18, 1994, via certified mail, return receipt requested, to the Hawthorne, New Jersey address. (Ex. A-4.) The receipt was signed "Marianne," on October 31, 1994, apparently by respondent's sister, Marianne Pelzmann, who suffers from cerebral palsy and mental retardation.

Respondent contends that she never gave him the letter.⁵

⁴Respondent stated that in February 1994, it became necessary for him to go to the Hawthorne, New Jersey address to care for his mother and that he was unable to go to Monroe. (Tr. at 112.) Regarding the mail, he speculated that the mail carrier stopped delivering mail because the "mailbox just got so jammed up, he ... presumed that I had moved." Id. He further testified that he never filed a change of address with the post office.

⁵Respondent testified that there were many occasions when his sister had lost or misplaced his mail. (Tr. at 128.) This asserted history appears not to have prompted respondent to take such steps as may have been necessary to ensure his receipt of important mail.

On December 5, 1994, the Administrator sent an order of suspension, certified mail, return receipt requested, to the Hawthorne, New Jersey address. (Ex. A-5.) The order, while stating that respondent's ATP certificate would be suspended for 90 days, did not include an effective date of the suspension. The receipt was signed on December 9, 1994. Respondent testified that, although it appears that his name was signed on the card, he is not the person who signed it. (Tr. at 126.) He did not know who signed his name, but speculated that one of his mother's tenants may have signed it. Id. He further claims that no one ever gave him the letter. The Administrator introduced into evidence a copy of respondent's ATP certificate for the purpose of comparing respondent's signature with the signature on the return receipt. (Ex. A-6.) Of the two signatures, the law judge stated that "the similarity is quite striking." (Initial Decision at 163.)

The Administrator sent an amended order of suspension, certified mail, return receipt requested, to the Hawthorne, New Jersey address on February 28, 1995. (Ex. A-7.) The amended order stated that the suspension would begin on March 28, 1995.⁶ The receipt was signed by respondent's sister on March 3, 1995. Respondent maintains that his sister never gave him the letter.

On July 5, 1995, the Administrator once again attempted to contact respondent at the Hawthorne, New Jersey address via

⁶Respondent admitted to acting as a required flight crew member on numerous flights between April 1, 1995 and June 29, 1995. (Joint Ex. 1.)

certified mail, return receipt requested. (Ex. A-8.) In this communication, the Administrator again requested that respondent surrender his ATP certificate and warned that failure to surrender the certificate could result in further legal action.⁷

The letter was returned on July 28, 1995 unclaimed, and was subsequently sent regular mail on August 8, 1995 to the New Jersey address. (Ex. A-9.) This letter was not returned. Finally, the Administrator sent respondent an emergency order of revocation, dated October 31, 1995, and received at the New Jersey address on November 1, 1995. Respondent testified that he had been at his New York address and received the emergency order on November 6, 1995 when he returned to New Jersey.

The law judge, after identifying the principal issue of the case as whether or not there had been service on respondent of the Administrator's suspension order, found that constructive service had been effected upon respondent by both the October 31, 1994 and the December 9, 1994 deliveries.⁸ (Initial Decision at 162-63.) He further found that the stale complaint rule does not apply in this case because the Administrator was diligent in his attempts to contact respondent, having first attempted to send the NOPCA to respondent's address of record well within the

⁷If an airman's certificate has been suspended or revoked, he must, under FAR section 61.19(f), return it to the Administrator when requested to do so.

⁸We note that, under the Board's rules, lawful service is presumed "[w]hen a properly addressed envelope, sent to the most current address in the official record by regular, registered, or certified mail, has been returned as undelivered, unclaimed, or refused." 49 C.F.R. § 821.8(d)(2).

required six-month period. On this basis, he affirmed the order of revocation.

Respondent asserts on appeal that the charges embodied in the original suspension order were stale and that, consequently, the revocation order may not stand on such faulty ground. He also argues that the underlying charges were not provable, as evidenced by the Administrator's decision to dismiss similar charges against respondent's copilot in the February 1994 occurrence. This, he maintains, further undermines the revocation order. The Administrator contends, however, that these issues are not properly before the Board in its review of the revocation order which charges respondent with acting as a required crewmember while his ATP certificate was under suspension. The stale complaint and adequacy of evidence issues, he continues, should have been raised in an appeal of the underlying suspension order. We agree with the Administrator.⁹

Since the law judge found that the October and December 1994 mailings to the New Jersey address provided respondent with at least constructive service of the underlying certificate action, his right to challenge the suspension order either substantively or procedurally expired when he did not timely appeal it to the

⁹Assuming, arguendo, that the stale complaint issue were properly before us, we would be constrained to find that the Administrator had good cause for any delay in respondent's receipt of the notice, as the Administrator's unsuccessful attempts to contact respondent at his address of record within six months of the alleged violation, evidenced by the two notices that were returned by the post office in June and July 1994, must be attributed to respondent's failure to keep the Administrator apprised of where he could be reached.

Board.¹⁰

Lastly, respondent argues that the law judge's credibility findings were "patently incorrect," yet sets forth no reason to justify reversal of those findings. It is well-settled that we will not disturb a law judge's credibility finding unless it was made in an arbitrary or capricious manner. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). No such showing has been made in the instant case. The law judge did not find credible respondent's testimony that his sister never gave him his mail. He further found that the signature on respondent's ATP certificate and the signature on the December 1994 receipt were "strikingly similar." Based on his evaluation of the evidence, the law judge implicitly determined that respondent had actual notice of the underlying suspension order, and further concluded that respondent did not exercise the high degree of care, judgment and responsibility that is required of an ATP certificate holder. We see no reason to disturb his findings.

¹⁰Although we do not now decide whether the underlying suspension order would have been dismissed as stale had respondent filed a timely appeal, we note that in Administrator v. Tsegaye, NTSB Order No. EA-4205 at 3 (1994), a respondent's stale complaint argument failed despite his receipt of the NOPCA more than six months after the incident because the NOPCA had been delivered to his address of record within the six-month period. We found that a "respondent should not be permitted to evade the Administrator's order through the furnishing of inaccurate address information to the FAA." Id.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied, and
2. The initial decision of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and
GOGLIA, Members of the Board, concurred in the above opinion and
order.